

August 25, 2003

Dear,

While the Directive on the patentability of computer implemented inventions (CII) is now going through a decisive stage at the level of the European Parliament with the vote in plenary scheduled for the end of September, the American Chamber of Commerce to the EU (formerly the EU Committee) would like to express once more its support for a balanced solution that would serve the competitiveness of the European industry.

We endorse the Legal Affairs Committee report prepared by MEP Arlene McCarthy, as presented to the Committee on 17 June for the reason that it codifies the current European practice. On most issues, such as the definitions of technical contribution and of the patentability requirements, the amendments adopted are a confirmation of the case law of the European Patent Office and the incorporation of this *acquis* in Community law is welcomed.

We however have a real problem with **amendment 20 (proposing a new Article 6a)** insofar as it represents a major disruption to the current practice. According to this amendment, *“Member States shall ensure that wherever the use of a patented technique is needed for the sole purpose of ensuring conversion of the conventions used in two different computer systems or network so as to allow communication and exchange of data content between them, such use is not considered to be a patent infringement”*

***This new Article 6a proposed in Amendment 20 is superfluous.***

The justification for the amendment states that the amendment is necessary to ensure open networks and avoid the abuse of dominant positions. We are not aware of incidents where the exercise of rights granted to the patent holder has prevented the development, distribution or use of interoperable programs. Moreover, EU competition policy measures are available to prevent abuse of dominant positions. Revisions of patent law are not necessary to address potential competition problems. Consequently, Article 6a is superfluous. Before adopting such an amendment that is likely to disrupt the existing legal situation, it is at least indispensable to assess in a practical manner the eventual problems that need to be addressed. Such a thorough assessment has not been made. Even if the Report of the Institute for Information Law commissioned in 2002 by the European Parliament was critical of some aspects of the European patent system, the report did not conclude on the existence of such abuse of the patent system, and no detailed factual analysis is thus produced to support the allegation underlying the amendment 20.

***Interoperability is already guaranteed by current EU Law, and reinforced by the amended Article 6 that incorporates the 1991 Software Directive's compromise within Patent Law.***

The new Article 6a attempts to ensure conversion of the conventions used in two different computer systems or networks -- read interoperability -- in order to allow communication and exchange of data content between them. This is unnecessary, since Article 6 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (the "Software Directive") already guarantees an exception for decompilation in order to develop interoperable systems. This provision will now be incorporated within the patent field thanks to the amended Article 6 of the draft Directive. This exception can thus be used to address Article 6a's purpose accordingly, and Amendment 20 thus becomes redundant. In addition, the amendment 23 (creating a new Article 8 (d)) obliging the Commission to present a report to the EP and the Council on "whether difficulties have been experienced in respect of the relationship between the protection by patents of CII and the protection by copyright of computer programs as provided for in Directive 91/250/EC" is a prerequisite step for the adoption of any further rule affecting interoperability issues.

***The exclusion of interfaces from IP protection was already rejected as an inadequate solution in the Software Directive.***

The amendment 20 would in practice exclude any patent protection in relation to all interfaces or "connecting equipment" - to use the term contained in the justification to Article 6a. There is an interesting precedent on this issue. During the debate on the 1991 Software Directive, nobody seriously considered to exclude the interfaces from copyright protection. Article 1 of the Software Directive just states that the criteria of protection should apply to the interfaces, in the same manner they have to apply to any other element of a computer program. We believe the same should apply in the patent field where the strict criteria of protection, including the technical contribution, have been applied in a satisfactory way to draw the line between what is protected and what is not. As for the field of copyright, there is no legitimate reason to exclude from patent protection some elements of computer systems, such as the interfaces or "connecting equipments".

***The broad scope of Amendment 20 would create legal uncertainty, and its language is unclear.***

A first observation on the language is that it is not restricted to "computer-implemented inventions" but rather extends to "patented techniques", hereby clearly including pure hardware inventions such as integrated circuits. Such wording - reinforced by the justification referring to "connecting equipment" - explicitly broadens the scope of the Directive on the patentability of CII and would bring into question the ability to enforce many granted patents.

Secondly, the expression “*for the sole purpose of ensuring conversion*” presumably means that all patents on any implementation of a conversion technique would be unenforceable, irrespective its specificity, even though they would only cover some of many possible alternative techniques for a particular conversion. The incentive to develop and invest in these techniques, within the general scope of conversion, would thus be reduced to a minimum due to the unenforceability of patents.

Thirdly, it is not clear that techniques such as decryption or decompression of data would fall outside this “*sole purpose*” language, as encryption and/or compression can be considered a “*convention*” used by one computer which requires conversion (decryption and/or decompression) by another system.

Finally, it is not clear what would constitute “*two different computer systems*”. Would two systems that are not absolutely identical be covered, such as identical products holding slightly different software? In the affirmative, the scope of Article 6a would be very broad.

All these uncertainties about the scope of this Article 6a are not acceptable by the industry, and in particular by SMEs, which need a well-defined framework in order to take the right decisions about their investments and IP.

***The proposed Article 6a is not compatible with the existing and future legal framework.***

This provision is contrary to the European Union’s obligations under Article 27(1) TRIPs which obliges signatories to grant patents and ensure that patent rights are “enjoyable” in all areas of technology. Article 6a would preclude the enforcement of patents in some areas of technology (*i.e.*, for connecting equipments). Amendment 20 is also not in line with the Draft Regulation on the Community Patent. Indeed, no similar exception for some patented technique is considered in this Draft Regulation, since it would simply contradict TRIPs.

For the reasons outlined above, AmCham EU expresses serious concern with Amendment 20 of the Legal Affairs Committee’s Report on the proposed CII Directive and calls on the European Parliament to delete Amendment 20 during its consideration of the Report in plenary session.

Sincerely,

Maja Wessels